No. 22,522

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSALIO B. MONTEZ,

Appellant,

v.

FRANK A. EYMAN, Warden
Arizona State Prison,

Appellee.

APPELLEE'S ANSWERING BRIEF

DARRELL F. SMITH
The Attorney General of the
State of Arizona

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Attorneys for Appellee

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JURISDICTIONAL STATEMENT

Appellee accepts appellant's jurisdictional statement.

STATEMENT OF FACTS

In addition to the facts set out in appellant's brief, appellee feels it necessary to set forth some additional factual matters to put this cause in its proper perspective.

In addition to his petition for reconsideration in the Arizona Supreme Court subsequent to this court's decision in Montez v. Eyman, 372 F.2d

100 (9th Cir. 1967) (T.R., Vol. 1, p. 62), appellant filed three other petitions for habeas corpus in the Arizona Supreme Court, one of which was lost, one of which was denied and one of which was denied after being treated as a petition for delayed appeal. (T.R., Vol. 1, pp. 3, 78-79)

In addition to the letters referred to in the Arizona Supreme Court Opinion, State v. Montez, 102 Ariz. 444, 432 P.2d 456, (T.R., Vol. 1, pp. 74-82), and the Second Opinion of the District Court (T.R., Vol. 1, pp. 86-95); other material consisting of letters to other attorneys, a letter to a judge, and prison mailing records were presented for consideration by the Arizona Supreme Court as regards appellant's right to appeal and his understanding and waiver thereof. (T.R., Vol. 1, pp. 70-72)

ARGUMENT

I

THE PROCEDURES FOLLOWED BY THE STATE OF ARIZONA, AND RECOGNIZED AS CORRECT BY THE DISTRICT COURT, PROVIDED APPELLANT WITH FULL EQUAL PROTECTION AND DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

It is important, at the outset, to determine what is not involved in the case at bar. A person convicted of a crime in Arizona has a constitutional right to appeal, as well as a constitutional right not to be required to advance any money or fees to secure any appellate rights. Arizona Constitution, Art. 2 § 24, 1 A.R.S. See also: A.R.S. §§ 13-1711, et seq.; Arizona Rules of Criminal Procedure, Rules 347-367, 17 A.R.S. A failure to perfect these appellate rights in accordance with the above cited statutes and rules which was occasioned by a cause for which the accused could not be held responsible has always been grounds for relief, either by habeas corpus, Application of Acosta, 97 Ariz. 333, 400 P.2d 328;

State v. Schroeder, 95 Ariz. 255, 389 P.2d 255, reversed Schroeder v. State, 101 Ariz. 177, 416 P.2d 974; or by a delayed appeal, Rule 16 (a), Rules of the Supreme Court, 17 A.R.S.

With these provisions in mind, the decisions cited by appellant concerning prison authorities preventing an accused from perfecting his appeal, United States v. Dowd, 180 F.2d 212 (7th Cir. 1950) vacated and remanded, Dowd v. United States, 340 U.S. 206, 95 L.Ed. 215, 71 S.Ct. 262; concerning the denial of an appeal for inability to prepay docket or filing fees, Douglas v. Green, 363 U.S. 194, 4 L.Ed.2d 1142, 80 S.Ct. 1048; and concerning failure to recognize letters requesting an appeal after formerly employed counsel wouldn't appeal unless funds were forthcoming, Newsom v. Peyton, 341 F.2d 904 (4th Cir. 1965), are simply not applicable to the case at bar. Appellant's relief has been denied because he has not shown that his failure to appeal in the proper manner was occasioned by any action other than his own careful and deliberate acts.

ARGUMENT

II

APPELLANT HAS NOT SUSTAINED HIS BURDEN OF PROOF CONCERNING HIS ALLEGED DENIAL OF HIS RIGHT TO APPEAL.

Habeas corpus is a civil proceeding in both the State and the Federal Court system, e.g. Leonard v. Eyman, 1 Ariz.App. 593, 405 P.2d 903; Estep v. United States, 251 F.2d 579 (5th Cir. 1958) and carries with it the civil burden of proof by a preponderance of the evidence by the petitioner. e.g. Beelar v. Crouse, 332 F.2d 783 (10th Cir. 1964); See Also: 28 U.S.C. § 2254 (d).

Except for petitioner's testimony in the first hearing in District Court (T.R., Vol. 2, pp. 2-23), critical portions of which were controverted by his court appointed attorney (T.R., Vol. 2, pp. 25-35); See also: Appellees Answering Brief, # 20, 963, (T.R., Vol. 1, pp. 50-54) there is no evidence probative of the fact that the decision not to appeal was not made in consultation with appellant and with his agreement, albeit a reticent and

grudging agreement. Even the letter to his attorney from the jail after conviction and before sentence, requesting a discussion about appeal which was considered and quoted by both the Arizona Supreme Court (T.R., Vol. 1, p. 75) and the District Court Judge (T.R., Vol. 1, p. 91) doesn't support his contention, when considered in light of his attorney's testimony that the matter was discussed after the receipt of this letter. (T.R., Vol. 2, pp. 29-30).

Until the filing of his habeas corpus petition in the Federal Court below, (T.R., Vol. 1, p. 1) in February of 1966, not one word was mentioned by petitioner in either his correspondence to his attorney, or in the habeas corpus petitions filed in the Arizona Superme Court (T.R., Vol. 1, pp. 78-79) concerning a denial of a right to appeal or the alleged refusal of his counsel to appeal. In other words, for a period of six and one-half (6 1/2) years, in spite of considerable correspondence to his own lawyer, other lawyers and a

judge, as well as the filing of two habeas corpus petitions in the Arizona Supreme Court, not one word was said about what is now vividly recalled and asserted to be a terrible denial of a constitutionally protected right. In addition, the brutality of the crimes (T.R., Vol. 1, p. 89), the relatively light concurrent sentences on multiple counts, and the very real possibility of heavier sentences upon retrail on the then substantial evidence (up to life imprisonment, A.R.S. § 13-643; See also: T.R., Vol. 2, pp. 34-35) makes it much more probable that appellant acquiesed in counsel's advice not to take a direct appeal, and waited for memories to fade and witnesses to disappear before launching out into the ever expanding and infinitely more fruitful area of habeas corpus, where any success at all would probably mean freedom as opposed to a possible reversal, retrail, reconviction and a new and perhaps harsher sentence.

It is just such a careful and deliberate decision, certainly now amply supported by the

evidence, which Justice Brennan has reference to in Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822:

> "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." Fay v. Noia, supra, 372 U.S. at 438, 9 L.Ed.2d at 869.

To say that the federal habeas judge in the case at bar abused this discretion on the facts available to him, would render meaningless all the efforts of the State of Arizona to insure an accused every possible opportunity to present his grievances to a proper state forum, while at the same time insuring and requiring reasonable promptness as to protect and preserve the rights of all the citizens in the integrity of the criminal justice system.

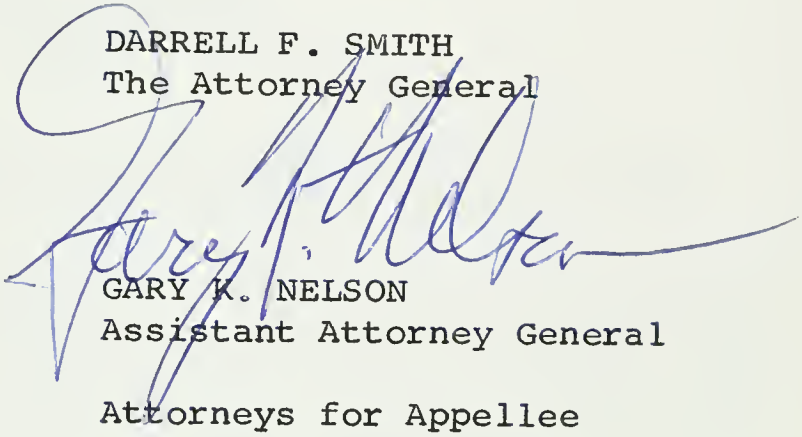
CONCLUSION

Appellant has received the full and complete consideration of all his claims in the Courts of the State of Arizona and the Courts of the United

States. The decision of the Federal District Court is amply supported by the evidence and should be affirmed.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General



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